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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 500

UNITED STATES OF AMERICA UPON THE RELATION AND FOR THE USE OF THE TENNESSEE VALLEY AUTHORITY, PETITIONER

v.

W. V. N. POWELSON, ASSIGNEE AND SUCCESSOR IN INTEREST OF SOUTHERN STATES POWER COMPANY, A CORPORATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

This reply brief is limited to the first question presented, namely, whether an allowance for water-power value should be denied under the principles of *United States* v. *Chandler-Dunbar Co.*, 229 U. S. 53. We shall consider (1) respondent's contention that his alleged property rights are governed by local law; and (2) the question of the applicability of *United States* v. *Cress*, 243 U. S.

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316, upon which respondent appears to place primary reliance.[1]

1. Respondent makes extended reference to local property law; he discusses British, colonial, and early state law, as well as decisions of this Court, all with a view to showing that he had title to the property in question, both the fast land and the land underlying the river. But we do not challenge his title in this proceeding, and it may be conceded *arguendo* that he had such indefeasible title to the property as it is possible for any private person to have. Our contention simply is that no one may have a right superior to that of the United States with respect to the flow of a river where that flow is subject to the plenary control of the United States, either because the river is navigable at that point or because it has such an effect upon navigation, etc., as to be subject to the same control. The landowner in the *Chandler-Dunbar* case similarly had otherwise complete property rights, but they were by their very nature subordinate to the superior right of the United States in the flow of the stream. Compare

[1] Reported together with the *Cress* case in the same opinion was *United States* v. *Kelly*, and it is upon the ruling in the *Kelly* case rather than the *Cress* case itself that respondent relies. However, the single opinion for the two cases is generally identified as *United States* v. *Cress*, and in order to avoid confusion we shall refer to it as such.

United States v. *Chicago, M. St. P. & P. R. Co.*, 312 U. S. 592, 596:

> Whether, under local law, the title to the bed of the stream is retained by the State or the title of the riparian owner extends to the thread of the stream, or, as in this case, to low-water mark, the rights of the title holder are subordinate to the dominant power of the federal Government in respect of navigation.

2. Respondent urges that the question has been adjudicated in his favor in one of the cases reported in *United States* v. *Cress*, 243 U. S. 316. There, the erection of a dam by the United States in a navigable stream had caused the water to back up on a nonnavigable tributary thereby diminishing the amount of power available to the owner of a mill dam situated on the tributary. The Court ordered an award of damages for that injury.

We respectfully submit that the opinion in the *Cress* case did not rest upon any distinction between navigable and nonnavigable streams, and that its ruling does not square with the *Chandler-Dunbar* decision. The *Chandler-Dunbar* case was neither cited by the Government nor apparently considered by the Court in this connection. We submit that the underlying theory of the *Cress* opinion has been shown to be incorrect in other opinions of this Court; that decisions relied upon

in the *Cress* opinion have since been either specifically overruled or limited; and that the opinion itself in the *Cress* case has been deprived of authoritative force by this Court when it recently remarked that "What was said in the *Cress* case must be confined to the facts there disclosed," See *United States* v. *Chicago, M., St. P. & P. R. Co.*, 312 U. S. 592, 597.

(a) At the very outset it should be carefully noted that nothing in the *Cress* case turned upon the fact that the property in controversy was situated on the non-navigable tributary rather than on the main stream. The Court unambiguously stated (243 U. S. at 319):

> In passing upon this contention we may assume, without however deciding, that the rights of defendants in error are no greater than if they had been riparian owners upon the rivers, instead of upon the tributary creeks.

In brief, the Court ruled that loss of water-power, or injury to the private dam-site, was compensable whether it be on the navigable or non-navigable portion of the river. That ruling, we believe, was in the teeth of the *Chandler-Dunbar* decision. We have made an examination of the Government's briefs in the *Cress* case and find that the *Chandler-Dunbar* case was not cited, and a reading of the *Cress* opinion shows that the Court did

not consider the *Chandler-Dunbar* decision in this connection. (Cf. 243 U. S. at 321–322.)[2]

(b) Moreover, the *Cress* opinion was based in large part upon the theory that Federal power and private property rights with respect to navigable waters must be measured in terms of the stream in its natural condition, and not as artificially raised or otherwise improved by dams, etc. That underlying assumption has been completely negatived by *United States* v. *Appalachian Electric Power Co.*, 311 U. S. 377.

(c) Several of the decisions that were heavily relied upon in the *Cress* opinion have been either overruled or deprived of any controlling effect by this Court. Thus, *United States* v. *Lynah*, 188 U. S. 445, has been overruled in part at least by the *Chicago, M., St. P. & P. R. Co.* case, *supra;* and *Monongahela Navigation Co.* v. *United States*, 184 U. S. 312, was restricted in *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 89, as resting upon an estoppel arising out of its peculiar facts.

(d) Finally, the scope of the opinion in the *Cress* case itself is now open to serious question in the light of this Court's statement in the *Chicago, M. St. P. & P. R. Co.* case that it "must

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[2] It is true that the Court cited the *Chandler-Dunbar* decision along with a number of other decisions as illustrative of a general statement (243 U. S. at 321), but its subsequent specific discussion of the right to compensation for water power indicates that it was probably unaware of the direct impact of the *Chandler-Dunbar* case upon that issue.

be confined to the facts there disclosed.'" In contrast, the doctrine of the *Chandler-Dunbar* case has recently been restated with approval by this Court in the *Appalachian Electric Power Co.* case, 311 U. S. at 427.

Thus, events transpiring subsequent to the *Cress* case have shown upon what uncertain ground it rests. The *Chandler-Dunbar* case, on the other hand, has withstood the passing of years, and has been recently approved again. In these circumstances, we respectfully submit that it is the *Chandler-Dunbar* case rather than the *Cress* case which should furnish the guiding principles for the disposition of this controversy.

Respectfully submitted.

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MARCH, 1942.

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[1] One of "the facts there disclosed" was that the private dam in question was a mill dam, which ordinarily does not involve the storage of waters over long periods and their subsequent release in substantial quantities so as to affect navigation below. Accordingly, it may well be that in those circumstances the auxiliary Federal power over non-navigable streams did not extend to control over the flow of the non-navigable stream at that point. That situation is to be sharply contrasted with the present case, where the existence of Federal power over the non-navigable portions of the Hiwasse involved herein is not open to serious dispute.

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